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Supreme Court of the United States

October Term, 1956

No.

LLOYD BARENBLATT,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on January 3, 1957.

Opinions Below

The oral opinion of the District Court is not reported. It is set forth in Appendix B *infra* at pages 45 to 47. The opinion and order of the Court of Appeals is not yet officially reported. They are set forth in Appendix B at pages 27 to 45.

Jurisdiction

The opinion and judgment of the United States Court of Appeals was entered January 3, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Is the statute and resolution establishing the House Committee on Un-American Activities unconstitutional on its face as requiring Committee violation of the First, Fifth, Sixth and Tenth Amendments, and the Constitutional principle of separation of powers?

2. May a witness be compelled to answer the questions of a Congressional investigating committee where the committee has two separate and coordinate purposes in the inquiry: the public exposure of the identity of the witness and his private associations and beliefs; and a legislative purpose?

3. Petitioner was charged with violation of 2 U. S. C. § 192 for refusal to answer the questions of a Congressional investigating committee concerning his political and private beliefs and activities. The evidence showed that the committee affirmatively avowed that its purpose in questioning petitioner was to expose publicly his political and private beliefs and activities. In the light of these facts, did evidence that the committee had at other times engaged in legislative activities, overcome the presumption of petitioner's innocence respecting the non-existence of a legislative purpose in the specific questioning here involved?

4. Whether a Congressional investigating committee may constitutionally compel a witness to answer questions concerning his membership while a graduate student, in a non-conspiratorial intellectual discussion group of graduate students.

5. Whether the House Committee on Un-American Activities may require answers to questions relating to political beliefs and associations.

6. The indictment here alleged that the petitioner before a "subcommittee" of the House Committee on Un-American Activities, "unlawfully refused to answer" certain questions "pertinent to the question then under inquiry." Was the indictment insufficient in the following respects?

(a) For failure to set out the question under inquiry.

(b) For failure to allege that the refusal was a "knowing" or "wilful" one.

(c) Because the alleged refusal occurred before subcommittee rather than the "committee" as required by Section 192.

7. Whether a witness deliberately, intentionally and knowingly refuses to answer a question in violation of 2 U. S. C. Sec. 192 where the committee directs the witness to answer without considering or overruling his proffered objections to its questions.

Constitutional Provisions and Statutes Involved

The Constitutional Provisions involved are Article I Section 1, Article II Section 1, Article III Section 1, the First Amendment, the Fifth Amendment, the Sixth Amendment, and the Tenth Amendment. The statutes involved are, 2 U. S. C. § 192, R. S. 102 (52 Stat. 942), Public Law 601, Section 21, 79th Cong., 2d Sess. (60 Stat. 812, 823, 828). Rule 7(c) of the Federal Rules of Criminal Procedure is also involved. All of the foregoing are set out in Appendix C *infra*.

Statement

Petitioner, Lloyd Barenblatt, was convicted in the District Court for the District of Columbia under an indictment charging violation of 2 U. S. C. Section 192 for refusing to answer questions before a subcommittee of the House Committee on Un-American Activities. The indictment charged in substance that petitioner "unlawfully refused to answer" the following questions "pertinent to the question then under inquiry" before a subcommittee of the House Committee on Un-American Activities:

Count One: Are you now a member of the Communist Party?

Count Two: Have you ever been a member of the Communist Party?

Count Three: Now, you have said that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?

Count Four: Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?

Count Five: Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions?

For a four year period immediately prior to his appearance before the Un-American Committee, petitioner had been employed as an instructor in psychology at Vassar College. After he received the subpoena to appear before the Committee his contract with Vassar College expired and was not renewed. Prior to his association with Vassar College for the period 1947-1950, he had been at the University of Michigan in the Graduate School of Studies, studying for his doctorate in social psychology. (Government Exhibit 8, p. 5802).[1] During most of the period of

[1] Government Exhibit 8 is the printed transcript of the hearings at which petitioner appeared.

his stay at the University he was a teaching fellow in psychology (Gov't Ex. 8, p. 5813).

Pursuant to subpoena, petitioner appeared and testified on June 28, 1954 in Washington, D. C. before a subcommittee of the House Committee on Un-American Activities. Four other witnesses had preceded him. He was the last witness on that day. Subsequently, in its official 1954 Annual Report to the House of Representatives, the Committee stated, with regard to the witnesses who testified that day:

> "The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success." (Gov't Ex. 10, p. 15)

The first witness who testified that day was Francis X. T. Crowley. Immediately before Mr. Crowley testified and after the composition of the committee was announced, the Chairman of the Committee asked the Committee counsel to explain the purposes "for this hearing this morning" (Gov't Ex. 8, p. 5753). In answer the Committee counsel stated:

> "The field covered will be in the main communism in education and the experiences and background in the party of Francis X. Crowley. It will deal with activities in Michigan, Boston, and in some small degree, New York." (Gov't Ex. 8, p. 5754)

Crowley then testified, among other things, that he knew appellant when he was a graduate student at the University of Michigan. He further testified:

> "Mr. Kunzig: And you knew him to be a member of the Haldane Club in the Communist Party?
> Mr. Crowley: Yes, just the Haldane Club.
> Mr. Kunzig: The Haldane Club of the Communist Party, I should say.

Mr. Crowley: Yes, and to my knowledge he left that and he left the University of Michigan.

Mr. Kunzig: Do you know where he teaches at the present time, if he teaches?

Mr. Crowley: Yes, he is at Vassar. I would like to say, in fairness to him—

Mr. Kunzig: Any testimony you can give, we would be glad to have.

Mr. Crowley: Yes, that he expressed to me his opinion that he was pretty much of the same opinion that I was about membership in the party. I am convinced that he has left it, the Communist Party.

Mr. Kunzig: Your close knowledge of him was up to about 1950?

Mr. Crowley: Yes, I have seen him a few times since then, occasional visits." (Gov't Ex. 8, p. 5778)

In respect to the Haldane Club, Mr. Crowley testified that it was a group for graduate students and teaching fellows (Gov't Ex. 8, p. 5773). In answer to the question as to what sort of activities the Haldane group engaged in, he said:

"They were chiefly of an intellectual nature discussing things. It was mainly a discussion group. There were very little of the activity of the kind that Neafus engaged in, that is, running around the campus with petitions or things like that." (Gov't Ex. 8, p. 5774)

He also stated the following in respect to the Haldane Club:

"Mr. Velde: Did you study Marxism?

Mr. Crowley: Yes, pamphlets on Marxism. I forget which ones, but the discussion centered around, as I recall, literature and cultures, on the subjects of arts, the relation to communism of Marxism, what is the function of the artist in that respect.

The Haldane Club was chiefly an intellectual group, discussion group.

• • •

> Mr. Velde: Do you feel that your colleagues had that idea, that they were engaged in a conspiracy?
>
> Mr. Crowley: I am sure that the ones I knew did not have that notion. They were people who were mostly the intellectual type of people who were getting their feet wet on something or other. Some of them may have had that in their mind, but I never heard it expressed in terms of overthrowing anything. It was never expressed to me that way." (Gov't Ex. 8, pp. 5781-5782)

Petitioner was actually called to testify shortly before 4 o'clock and was the last witness that day. The subcommittee made no statement advising the petitioner of the purpose of the particular inquiry (Gov't Ex. 8, p. 5813).

Petitioner, in response to the questions upon which the indictment rests attempted to present orally a written statement of objections that he had prepared. These objections constituted his reasons for refusing to answer. They set forth the limitations upon the Congressional power of investigation and included the following excerpt from *S. E. C.* v. *Jones*, 298 U. S. 1:

> "• • • The citizen when interrogated about his private affairs has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer." (Gov't Ex. 8, pp. 5807-5808)

The subcommittee refused to hear these objections and indicated that it was only concerned with whether he was asserting his privilege against self-incrimination. Petitioner asserted that he was not relying on the Fifth Amendment privilege. While the subcommittee ultimately received the written statement physically the record shows that it was not considered or ruled upon by the subcommittee as a whole.[2] Petitioner was nonetheless directed to answer.

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[2] One member of the subcommittee stated that he had read the objections.

The Proceedings Below:

Petitioner's motion to dismiss the indictment for insufficiency was denied. The trial came before District Judge Alexander Holtzoff on March 14, 1956 in the United States District Court for the District of Columbia. After some evidence had been presented to the jury, petitioner waived trial by jury (Tr. 146)[3] and the case proceeded before Judge Holtzoff without a jury. After trial defendant was adjudged guilty (Tr. 192) and sentenced to imprisonment for a period of six months and fined $250 (Tr. 199). During the course of the closing arguments, the court commented, "There is no contention he was disrespectful or contumacious except in a legal sense. There is no doubt about that" (Tr. 174).

The Court of Appeals upheld the conviction. It held that the law establishing the House Committee on Un-American Activities was constitutional and that "Courts must presume congressional investigations to have a valid legislative purpose" (App. B., p. 36). Even if the subcommittee had also had the purpose in summoning Petitioner of "demonstrating" his "identity to the people of Michigan", the Court below held that this did not invalidate the questioning. It held that this Committee had power to inquire into the operations of a non-conspiratorial Marxist study group composed of graduate students at a university as a matter which the Committee can and did regard as having value in the exercise of its duty.

The court upheld the validity of the indictment. It upheld the subcommittee failure to consider and rule on Petitioner's written objections on the ground that he had been directed to answer and could have presented them orally.

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[3] Petitioner was granted leave to appeal to the Court of Appeals on the typewritten transcript. References preceded by "Tr." are to pages of the typewritten transcript.

Reasons for Granting the Writ

The Importance of the Questions.

The decision of the Court below is the high water mark of judicial abnegation before the assertion of Congressional power over the private lives and political liberties of citizens. As the *Washington Post* stated in editorial comment (see Appendix A, p. 25, *infra*), "The opinion by Judge Bastian pushes the boundary between what Congress may ask and what it may not ask very far out indeed. It amounts to saying that Congress may demand an answer to any question that Congress thinks appropriate to its legislative duties."

This is the first case to come before this Court where the evidence unequivocally shows by a formal, official admission of the House Committee on Un-American Activities that the Committee had a purpose other than legislative in seeking to exact answers from a witness before it.[4] The Committee's own official report to the House of Representatives asserts that its purpose in questioning petitioner was to expose [illegible] and others to the community, on its face an exercise of a judicial and executive function of punishment. The ruling below which sustained the exercise of committee power in the face of the Committee's own avowal of its non-legislative purpose places the stamp of judicial approval upon the open, deliberate abuse of Congressional power over citizens.

Moreover, the ruling below sustains the intrusion of illegal power into the area of education, of the intellectual discussion of ideas, an area traditionally free from governmental restraint. The educational process, the growth and acquisition of knowledge by the exchange and ex-

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[4] This Court recently granted a writ of certiorari in *Watkins* v. *U. S.* (No. 261, Oct. Term 1956) on similar questions involving the power of Congress to exercise the judicial and executive function of exposure.

amination of ideas, is the seminal force upon which all our society depends. The continued growth of our society demands that education remain free from government censorship and inquisition.

Congress, the selected representative of the electorate, has no power to enact laws which abridge the political freedoms of the electorate. Congress cannot make itself the master of the people whose servant it is. Nor can Congress do by the technique of investigation what it cannot do through legislation. The inquiry here into political beliefs and associations protected by the First Amendment raises most fundamental issues.

I

The statute and resolution establishing the House Committee on Un-American Activities is unconstitutional as requiring a violation of rights preserved by the First, Fifth, Sixth and Tenth Amendments, and the principle of separation of powers.

We will not burden this Court with reiteration of arguments for the unconstitutionality on its face of House Resolution 5, made by Judges Edgerton and Clark dissenting in *Barsky* v. *U. S.* (C. A. D. C. 1948) 167 F. 2d 241, cert. denied 334 U. S. 843; and *U. S.* v. *Josephson* (C. A. 2, 1947) 165 F. 2d 82, cert. denied 333 U. S. 838, respectively. We are in accord with their position and we urge it on this Court.

The resolution establishing the Committee requires that it investigate "subversive" and "Un-American" propaganda. But subversive and Un-American propaganda cannot be investigated and classified without investigating and classifying all political ideas as good or evil. The Committee must, from the very reason of its being, become what it has become, the national arbiter of acceptability of political thought. The resolution on its face calls for the

classification and exposure of ideas, and persons holding ideas, according to their degree of "taint" or their remoteness therefrom. The public scorn involved in such classification and exposure is punishment as much as a judicially imposed sentence to the pillory. Such punishment is a legislative arrogation of executive and judicial powers without the constitutional protections surrounding executive and judicial action.

The instant case illustrates the extent of committee power under the resolution. Petitioner, summoned before a subcommittee of the Committee, refused to account to it for his activities as a university student, discussing ideas with other students in a non-conspiratorial discussion group. The Committee concedes that in examining petitioner it intended to expose his "identity" in that respect. The court below held that the Committee had power, regardless of the non-conspiratorial nature of these activities, to examine them publicly and to classify them as to the degree to which they might be tainted. (Appendix B, p. 42 *infra*).

In the instant case the court describes the discussion group involved as an adjunct of the Communist Party. But one of the questions asked pertains to the University of Michigan Council of Arts, Sciences and Professions, an organization whose taint arose from the mere presence of Communist members. The logic of the decision and the practice of the Committee show that the power of censorship, of inquisition, of classification and exposure, inherent in the statute creating the Committee, extends to all ideas, organizations and persons.

Public Law 601 must be read in conjunction with and as a part of a criminal statute, Section 192. As such it is classic illustration of amorphous statutory language which cannot meet the constitional requirements for definiteness in a criminal statute. *Connolly* v. *General*

Construction Co., 296 U. S. 309; *Lanzetta* v. *New Jersey*, 306 U. S. 389. It is especially dangerous here where vagueness permits infringement of political and intellectual freedoms. *Thornhill* v. *Alabama*, 310 U. S. 88.

II

The admitted illegal purpose of the Committee in investigating petitioner invalidated its inquiry.

It is long settled that the Congress has no power of investigation, to compel testimony, except as an implied derivative power in aid of its express power of legislation. It is only the purpose to aid legislative processes which can make valid what would otherwise be an arbitrary and illegal invasion of the rights secured to citizens by the constitution. *Kilbourn* v. *Thompson*, 103 U. S. 168; *McGrain* v. *Daugherty*, 273 U. S. 135; *Sinclair* v. *U. S.*, 279 U. S. 263; *U. S.* v. *Rumely*, 345 U. S. 41; *Quinn* v. *U. S.*, 349 U. S. 155.

The Committee here openly avowed its illegal purpose in compelling petitioner's testimony. The 1954 official annual report of the full Committee to the House of Representatives, the sole Committee reference to petitioner, states with respect to the hearing in which he was involved:

> "The 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success." (Gov't Ex. 10, p. 15).

The Committee statement demonstrates the evils inherent in abuse of investigative powers. The subcommittee had no authority to question petitioner for the admitted

purpose of shaping public opinion by "demonstrating" his "identity." Congress, the servant of the electorate, cannot misuse its investigatory powers in order to shape and mold the very public opinion whose ultimate reflection and servant it is.

The subcommittee also invaded the area of punishment which the Constitution reserves for the courts and the Executive. The record of the petitioner's appearance before the subcommittee demonstrates that the subcommittee had in truth constituted itself an expurgatory tribunal before which he must either cleanse himself by a quasi-ritualistic confession or be "identified" and suffer economic and other loss. He was abjured by the subcommittee to "clean up," and to "get out of that embarrassing situation and then start from there." He was then accused of having rejected the opportunity to "come clean." (Gov't Ex. 8, p. 5803).

Especially significant is that the Congressional inquiry, petitioner's trial and exposure, was concerned with his activities as a student and teacher. The subcommittee had already been informed in sworn testimony that the group with which petitioner was allegedly associated was an intellectual discussion group of graduate students concerned with discussion of cultural, political and scientific problems. Nevertheless, it persisted in its questioning of petitioner.

Freedom of academic inquiry lies at the very heart of our society. By attempting to expose petitioner's participation in intellectual inquiry the subcommittee assumed the role of censor.

In sustaining the conviction the court below found that the subcommittee had a legislative purpose in addition to its admitted purpose of exposure in questioning petitioner, and held itself bound to sustain Congressional power once that finding had been made. We submit that

the sole purpose of the inquisition was exposure. But, conceding *arguendo* that the court below was correct in finding a legislative purpose in the inquisition here, the avowed exposure purpose destroyed any legal validity that questioning might have otherwise possessed.

The ruling below transforms the line of decisions beginning with *Kilbourn* from a barrier protecting the rights of individuals into a technique by which those rights are destroyed. The way is open in any case for over zealous men, careless or contemptuous of the rights of others, to use an implied derivative power of Congress to destroy rights expressly preserved to the people under our constitution and to prevent and destroy the governmental structure designed to safeguard those rights. As Justice Jackson pointed out in *Thomas* v. *Collins*, 323 U. S. 516, 547, modern inroads on individual liberties are rarely direct and open. They proceed by associating the exercise of the liberty with an area of permissible state control.

In *Marshall* v. *Gordon*, 243 U. S. 521, this Court considered the argument that a coordinate permissible legislative purpose (safeguarding of impeachment proceedings) justified the exercise of Congressional power to achieve a constitutionally forbidden goal. In that case, as here, the House of Representatives had sought to punish a citizen for the exercise of his rights. It was argued there as here that the punishment was proper since the act involved (writing an intemperate letter to a House investigating committee) had interfered with a proper Congressional activity. The Court held that the implied power of Congress to safeguard its legislative powers "would necessarily perish by operation of the constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends." 243 U. S. at page 548.

In this case, too, as the Court said in *Marshall* v. *Gordon*, "legislative power has been transformed into

judicial authority" (248 U. S. at p. 547). In this case, too, Congressional authority expanded beyond its proper limits "must necessarily perish by operation of the constitution."

And in *McGrain* v. *Daugherty*, 273 U. S. 135, which stands as a landmark for the assertion of implied Congressional investigatory powers, the Court there expressly limited those powers to the ends they were constitutionally designed to serve. In *McGrain* the Court held that the investigation was not invalid merely because Congressional resolution authorizing it stated "legislative and other purposes" for the investigation. In preserving the investigation the Court merely held that the phrase "and other purposes" by itself was too "indefinite and untenable" to invalidate the entire proceeding (p. 180). The Court was careful to point out, however, that "it is not as if an inadmissible or unlawful object were affirmatively and definitely avowed." 273 U. S. p. 180. The decision makes clear by its citation of *Marshall* v. *Gordon* that had "the other purposes" stated in the resolution been regarded as a sufficient statement of Congressional intent the inquiry would have been invalid.

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. • • •. We must assume for present purposes that neither house would be disposed to exert the power beyond its proper bounds nor without due regard to the rights of witnesses. But, if contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief" (pp. 175-176).

See also *Sinclair* v. *U. S.*, 279 U. S. 263, 291-292, 295.

In this case, "an inadmissible and unlawful object", *i.e.*, the public exposure of petitioner's "identity", is "affirmatively and definitely avowed." The Court below erred in failing to direct petitioner's acquittal.

III

The Committee's only purpose in questioning petitioner was to expose and punish his activities as a student.

The argument above assumes validity in the lower court's finding of a coordinate legislative purpose in the questioning of petitioner. In point of fact, there was no evidence that the questioning was for any legislative purpose.

The direct evidence in the record as to the Committee purpose in questioning petitioner is the avowal in its 1954 report that it wished to "demonstrate" his "identity to the people of Michigan." The court below held, however that "Courts must presume congressional investigations to have valid legislative purposes." It buttressed this presumption by finding that the 1954 report of the Committee had made legislative recommendations and that in 1953, 16 months before petitioner appeared, the Committee had begun what the court found was a proper "investigation into the field of education." The court concluded in effect, that because the Committee had, from time to time, acted as though it had a legislative purpose, the court's presumption of validity was supported here (App. B, pp. 36-37).

Even if the Committee had from time to time asked questions of other witnesses for an apparent legislative purpose, such a finding, unaided by presumption, does not justify finding that a legislative purpose was present in the questioning of petitioner. At most, such a finding shows that there could have been a legislative purpose in the questioning of petitioner, not that there was one. *A fortiori* the evidence is insufficient to support a finding of legislative purpose where a committee avowal of a contrary purpose is shown. The ruling of the court below must ultimately rest solely upon its presumption that

"Congressional investigations have valid legislative purposes."

This presumption has no validity in a criminal case. The ruling of the court below conflicts with the holding of this Court in *Sinclair*: whatever usefulness a presumption of regularity may have in other areas, in a criminal case "the stronger presumption of innocence attended the accused at trial" (279 U. S. at p. 296).

The departure from the rule of the *Sinclair* case is extreme here. The evidence as to the committee purpose in calling Petitioner was the excerpt from its official 1954 report to the House. This statement, by omitting from its discussion of the purpose of the inquiry where Petitioner testified any reference to a legitimate purpose, strongly supports Petitioner's contention below that no legitimate purpose existed. However, the court below held it inadequate to overcome the presumption of regularity since it was not necessarily inconsistent with a presumed concurrent legitimate purpose. The effect of that holding is to rule out any practicable hope of ever rebutting the presumption of congressional regularity. If the Committee had a purpose other than demonstrating petitioner to the people of Michigan, that purpose would have been reported formally to the whole House.[5]

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[5] The statement of the committee counsel made before the testimony of another witness, that "the field covered will be in the main communism in education and the experiences and background in the party of Frances X. T. Crowley," does not support the government's case. It is in no way inconsistent with the official statement of Committee purpose "to demonstrate" petitioner to the people of Michigan.

IV

The investigation by the subcommittee into the political or other private beliefs and activities of Petitioner as a graduate student and teacher was not a proper exercise of congressional investigating powers.

Even if the resolution creating the Committee could conceivably be considered valid on its face, its application here is beyond congressional power. The inquisition of Petitioner invaded the rights which the Tenth Amendment reserves to the people, in this case the right of free intellectual inquiry among scholars, a right protected also by the First Amendment.

Governmental investigation, exposure and classification of intellectual activities in the scholastic community neeessarily interferes with academic freedom. Free inquiry for teacher and student cannot survive, much less flourish, where the possibility of governmental retribution by public exposure and classification looms over academic discussion. Enforced conformity is the antithesis of academic freedom.

In the *Dennis* case, *U. S.* v. *Dennis,* 341 U. S. 494, which represents the furthest reach of governmental control over First Amendment liberties, this Court, in order to save the constitutionality of the statute, rejected an interpretation of the statute that would reach "academic discussion of the merits of Marxism-Leninism" (341 U. S. at p. 501).

The *Dennis* ruling reflects the traditional awareness this Court has had of the danger that education be made "into a machine entirely subservient to the will of government." *Trustees of Dartmouth College* v. *Woodward,* 4 Wheat. 518 (1819). The decisions consistently recognize that any state restrictions on any student, teacher or parent to follow prescribed materials, thoughts, intellectual patterns or associations, can only shatter learning and progress and the core of democracy itself. *Meyer* v. *Nebraska,* 262 U. S. 390; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Farrington* v. *Tokushige,* 273 U. S. 284, 298-

299; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

The proceedings against petitioner do not square with these great principles of freedom. The context of the hearings shows that all the questions were directly related to his beliefs and association as a student and teacher on the campus. The investigation in respect to petitioner did not involve special governmental security, defense or classified research or projects, nor, indeed, any governmental work at all. And petitioner was in no way so engaged.

The court below recognized that the power of Congress was limited in the area of education (Appendix B, p. 39). Despite that acknowledgment the court sustained the questioning here. It relied on its previous ruling in *Barsky* v. *U. S.*, which held in effect that the powers of Congress to investigate were broader than its powers to legislate and extended into areas where legislation was forbidden by the Constitution. The court below then cited that part of the declaration of principles by this Court in *Quinn* which forbids Congressional investigations "into private affairs unrelated to a legislative purpose," as authority for the continuing validity of the *Barsky* holding.

This appears to be the first application by a Court of Appeals of the general principles in *Quinn* relating to the limitations on Congressional investigations.[5a] It raises

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[5a] The full paragraph, of which the court below cited only the first two sentences reads as follows:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate, similarly, the power to investigate must not be confused with any power of law enforcement; those powers are assigned by our Constitution to the Executive and Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here."

important questions meriting the attention of this Court. The *Barsky* case in effect elevated an implied power of Congress, the power to investigate over and above the constitutional limits placed upon the express power to legislate from which it is derived. Petitioner submits that the impact of *Quinn* is exactly to the contrary. *Quinn* read together with *Rumely* effectively removes any authority from the *Barsky* ruling.

The *Barsky* doctrine as applied here strikingly illustrates that tendency of rights to "declare themselves absolute to their logical extremes," against which this Court warned in *Rumely*. The court below rested the source of congressional power on the power to inquire into the existence of a clear and present danger. But the actual questions which the court below upheld were admittedly concerned solely with petitioner's academic activities in the realm of ideas (Appendix B, p. 41), activities beyond the power of Congress and where no danger cognizable by Congress can exist, potentially or actually.

The *Barsky* doctrine and its extension here are contrary to the declarations by this Court in *Rumely* and *Quinn*. In *Rumely* this Court gave the power of investigation no preferential status but equated it with a statute affecting First Amendment rights. In *Quinn* this Court stated without equivocation that the power to investigate, broad as it may be, does not "extend to an area in which Congress is forbidden to legislate" and "must not be confused with any power of law enforcement."

V

The indictment is insufficient.

A. The failure to allege the question under inquiry. The rule below that the question under inquiry need not be set forth in the indictment conflicts with the decision in *U. S.* v. *Lamont* (C. A. 2, 1956), 236 F. 2nd 312. In that case the Court of Appeals ruled that an indictment for refusal to answer questions of a committee which failed to allege the subject under inquiry was insufficient. The Court of Appeals held in *Lamont* (p. 315, fn. 5):

> "It may be noted that in recent cases involving perjury before a Congressional Committee, the indictment sets forth at length the nature and scope of the inquiry. See *U. S. Debrow*, 5 Cir. 203 F. 2d 699, 702, note 1 (involving this same committee), reversed on other grounds 346 U. S. 374; *U. S.* v. *Lattimore*, D. C. Cir., 215 F. 2d 847, 856, note 2. Although concededly the purpose of such allegations in perjury prosecutions is to establish the materiality of alleged false answers, like allegations are equally requisite here to establish the authority of the subcommittee in the premises." [6]

A like conflict appears between the ruling below and *U. S.* v. *Metcalf* (unreported) U. S. D. C., S. D. Ohio Crim. No. 3052.

B. The failure to allege an intentional, "knowing" refusal to answer. The *Quinn*,[7] *Emspak* [8] and *Bart* [9] cases make clear that no crime can arise under the statute from

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[6] The Court of Appeals for the Second Circuit not only held the indictment insufficient but that, on the basis of judicial notice, the government could not plead a provable case of pertinence. Regarding the latter holding only, it observed that "The result might well be different * * *" were the House Committee on Un-American Activities involved (p. 316, fn. 6).

[7] 349 U. S. 155.

[8] 349 U. S. 190.

[9] 349 U. S. 219.

mere failure to answer Committee questions. The failure to answer must be more than accidental. It must occur under circumstances which would place a witness on notice that the Committee demands an answer. In other words, there must be a state of mind most often described in criminal statutes and indictments by the words "knowing" or "wilful". This is an essential element of the offense; without proof thereof no crime has been shown. The indictment here fails to allege that element.

The court below upheld the District Court ruling, resting upon its opinion in *U. S.* v. *Deutsch* (C. A. D. C. 1956) 235 F. 2nd 853. In *Deutsch* the court below held that refusal was an intentional act and hence no further allegation of a state of mind was necessary where a refusal to answer was alleged. The court indicated that any doubts it might have had on this question were resolved by the incorporation of the word "unlawfully" in the indictment.

But not every refusal to answer is a "wilfull" or "knowing" one. More is required for guilt than that the verbal act of refusing be produced by an act of will. It must be deliberate, *i.e.*, knowing; a specific rather than a general intent is required. *Quinn* v. *U. S., supra.* The word "unlawfully" does not supply this element. It is a mere "conclusion of the pleader." *U. S.* v. *Schneiderman,* 102 Fed. Supp. 87, 91, 93. It does not give the elements of the crime, it leaves them to speculation.

Sinclair v. *U. S.* would appear to support petitioner's position. It is significant that, although that indictment sets out that Sinclair "unlawfully refused" to answer the drafter was not satisfied with the allegation. The indictments sets out factually that Sinclair's refusal to answer was deliberate.[10]

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[10] "Said Hon. Thomas J. Walsh thereby meaning and intending as said Harry F. Sinclair then and there well knew and understood, to elicit from him, the said Harry F. Sinclair, facts which then were within his knowledge, touching the execution and delivery of a certain contract, etc. * * *."

The ruling below is important because of the constant flow of prosecutions for refusal to answer questions of congressional committees. Moreover, it conflicts directly with the opinion of Judge Weinfield in *U. S.* v. *Lamont* (S. D. N. Y. 1956) 18 F. R. D. 27, affirmed on other grounds (C. A. 2, 1956) 236 F. 2d 312, a decision which gains in vitality by the failure of that Court of Appeals to comment upon it when reviewing the case.

C. The allegation that petitioner appeared before a subcommittee rather than a committee. Section 192 defines the crime as a refusal to answer before a "committee." The indictment alleges only that a "subcommittee" was involved. If words in a criminal statute are to be given their ordinary meaning the indictment is defective and should be dismissed.

Legislative history of the section reveals a full congressional awareness of the danger of abuse of the investigatory power. *e.g.*, 26 Cong. Globe 34 Cong., 3rd Sess. (1857) 439-440. The fewer the men who share power the more likely its abuse. A congressional committee is composed of relatively large numbers of men with divergent viewpoints and temperaments. The scheme of the statute would lessen the risk of oppression of individuals by giving the initial power to require an answer to a full committee, rather than a subcommittee.

VI

The failure to prove contumacy.

It is now established doctrine that before there can be a conviction for violation of Section 192 because of the refusal to answer questions, it must be proven beyond a reasonable doubt that the defendant deliberately and intentionally refused to answer. To meet that burden, the prosecution must prove that the Committee considered the objections raised by the witness and advised the wit-

ness that his objections were overruled and that his answers were thereby required. *Quinn* v. *United States* (*supra*), at pp. 165-170; *Emspak* v. *United States* (*supra*); *Bart* v. *United States* (*supra*).

The prosecution failed to prove beyond a reasonable doubt that the petitioner was accorded the benefits of this required procedure. It appears from the record that the subcommittee never even considered the objections to the questions offered by the petitioner. Nor did it ever overrule the objections. There is not the slightest evidence that before the first so-called direction to answer, the subcommittee or any of its members had read or in any other way knew of the objections petitioner was offering to make. The subcommittee did ascertain what objection the petitioner was *not* making, that is, possible self-incrimination. Thus, the subcommittee refused to hear or accept in writing, or consider, or rule upon any objections the witness intended to make.

The court below held that the petitioner could not complain of his treatment since he had ample opportunity to raise his objections orally. A layman cannot be required or expected to make oral legal objections. The committee rules forbid the making of objections by counsel. The petitioner tried to present his objections in writing. When they were not considered or ruled upon his duty was done. His refusal to answer subsequent to the subcommittee refusal to consider his objections was not contumacious.

CONCLUSION

For the foregoing reasons it is prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

David Scribner,
Attorney for Petitioner,
9 East 40th Street,
New York, N. Y.

Appendix A

THE WASHINGTON POST

AN INDEPENDENT NEWSPAPER TUESDAY, JANUARY 8, 1957

EDITORIAL

The Powers of Congress

The Court of Appeals opinion upholding the contempt conviction of Lloyd Barenblatt, who refused to answer questions put to him by the House Committee on Un-American Activities, seems to say that the congressional power of inquiry is almost unlimited. The Court concedes that Congress "does not have a general power to inquire into political beliefs and associations," but says that it "does have that power where the answer to the question posed can be and is regarded by Congress as having value in exercise of legislative duty."

This opinion by Judge Bastian pushes the boundary between what Congress may ask and what it may not ask very far out indeed. It amounts to saying that Congress may demand an answer to any question that Congress thinks appropriate to its legislative duties.

Yet the issue itself, as Leo Pfeffer notes in his new book *The Liberties of an American*, remains to be definitely decided by the Supreme Court. Even where Congress *thinks* its purpose good and valid, there must be some limit beyond which it may not go in questioning citizens as to their political beliefs and associations. The Court of Appeals opinion does not help much in locating that limit.

The courts have been understandably reluctant to attempt any curb on the investigative right of Congress itself. In the *Hearst* case in this same court in 1936, the court acknowledged this reluctance and defended its own diffidence by saying that Congress "is as much the guardian of the liberties and welfare of the people as the courts." So it is, and if there is such a thing as the right to silence

in the face of inquiry, its preservation will probably depend more upon the restraint of Congress than the interposition of the courts.

At the same time, the courts have not been so reluctant to intervene when questions have been found beyond the powers given to committees by Congress. In the *Rumely* case, the House lobbying investigation was set down for going beyond its authority into a trespass of the First Amendment. In the *Harvey O'Connor* and *Corliss Lamont* cases, the Committee on Government Operations was similarly set back for exceeding its directive. Congress itself appears once again, in these opinions, as the proper guardian against broad, roving, unlimited inquisitions of the citizen.

In the Barenblatt opinion, the Court of Appeals has taken a broad and generous view of the amplitude of congressional power as such. If this view prevails, the rights of individuals will depend even more than heretofore upon the limits set by congressional wisdom rather than the bounds set by constitutional authority. Power is most becoming, however, when it is exercised with restraint. The very fact that congressional authority is given such broad range in this opinion ought to stimulate an additional sense of responsibility on the part of Congress—responsibility to be selective and precise in its mandates to committees and to guard more scrupulously against the kind of fishing expeditions that too often have been the result of undefined power.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,327

LLOYD BARENBLATT,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Columbia

Decided January 3, 1957

Mr. David Scribner, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. David Rein* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll* and *William Hitz*, Assistant United States Attorneys, were on the brief, for appellee.

Before WASHINGTON, BASTIAN and BURGER, Circuit Judges.

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BASTIAN, *Circuit Judge:* Appellant was tried, convicted and sentenced under 2 U. S. C. § 192 (1952)[1] (contempt of Congress). From this conviction the present appeal was taken.

The factual situation disclosed by the record is as follows: On June 28, 1954, one Francis X. T. Crowley testified before a subcommittee of the Committee on Un-American Activities of the House of Representatives concerning his past membership and activities in the Communist Party, and identified the appellant as a member of the Haldane Club of the Communist Party while appellant was a graduate student and instructor at the University of Michigan. On that same day, appellant appeared before the subcommittee in response to its subpoena, at which time, after certain preliminary inquiries, appellant was asked the questions which he refused to answer. These refusals are the basis for his indictment, which charges that appellant "unlawfully refused to answer" the following questions:

"Count One: Are you now a member of the Communist Party?

"Count Two: Have you ever been a member of the Communist Party?

"Count Three: Now, you have said that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?

---

[1] "*Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

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"Count Four: Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?

"Count Five: Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions?"

The indictment charges that these questions "were pertinent to the question then under inquiry," and that the subcommittee was conducting hearings at the time pursuant to its enabling resolution.[2] This law establishes the Committee on Un-American Activities and vests in it, and its duly constituted subcommittees, the duty:

> ". . . to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

At the time of appellant's appearance, the subcommittee was conducting an inquiry into communism in the field of education, and the record reflects that appellant had knowledge of this.

I

The first ground urged for reversal is that the indictment is fatally defective in that it does not plead a deliberate and intentional or knowing refusal to answer. This specific question was ruled on by this court contrary to appellant's contention in *United States* v. *Deutch*, —— U. S. App. D. C. ——, 235 F. 2d 853 (1956).

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[2] Public Law 601, Sec. 121, 79th Cong., 2d Sess. (60 Stat. 828), and H. R. Res. 5, 83d Cong., 1st Sess. (1953).

The argument is also advanced that the indictment is defective in that it does not describe the matter into which the subcommittee was inquiring at the time appellant appeared before it. The indictment alleges an unlawful refusal to answer "questions which were pertinent to the question then under inquiry," which inquiry was made pursuant to the subcommittee's enabling resolution. Thus, it appears that the indictment stated all the elements of the offense charged and served notice on appellant as to what conduct on his part constituted the alleged offense. This satisfies the requirements of Fed. R. Crim. P. 7(c). See *United States* v. *Josephson*, 165 F. 2d 82 (2d Cir. 1947), *cert. denied*, 333 U. S. 838 (1948).

It is also contended that the indictment is fatally defective in that it alleges a refusal to answer questions before a subcommittee of a committee, and that Congress did not intend to make it a crime to refuse to answer questions of a subcommittee. Appellant urges that Congress was fearful of having penal sanctions imposed upon those who refused to answer questions propounded by subcommittees, as Congress considered subcommittees more subject to partisanship and more likely to abuse their powers than full committees. We disagree. Nothing has been shown which reflects that Congress has indicated such belief. We can only construe the statute in the light of the obvious purpose for its enactment. That purpose was to discourage the impairment of the vital investigative function of Congress. *Fields* v. *United States*, 82 U. S. App. D. C. 354, 164 F. 2d 97, *cert. denied*, 332 U. S. 851 (1948). The function Congress sought to protect is as often committed to subcommittees as it is to full committees of Congress, as indeed it must be.

Construing the statute in a manner consistent with its obvious purpose [*Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377 (1948), *United States* v. *Brown*, 333 U. S. 18 (1948), *The Emily and The Caroline*, 22 U. S. (9 Wheat.)

381 (1824)] we hold that Congress intended the word "committee" in its generic sense, which would include subcommittees.

II

Next, appellant contends that the subcommittee failed to consider and overrule his objections to the questions asked him, and that, therefore, there could be no proof beyond a reasonable doubt of a criminal intent to refuse to answer. He insists that to meet this burden the subcommittee must be shown to have considered his objections, to have overruled them, and then to have directed him to answer. In support, appellant cites *Quinn* v. *United States*, 349 U. S. 155 (1950), *Emspak* v. *United States*, 349 U. S. 190 (1950), and *Bart* v. *United States*, 349 U. S. 219 (1950).

The record of the subcommittee hearing for the day appellant appeared was admitted in evidence at the trial.[3] From that record, we are convinced that appellant did communicate his objections to the subcommittee and that he was clearly directed to answer each of the questions. Furthermore, it is entirely clear that appellant had ample opportunity to state any additional objections he may have had.

Appellant came before the subcommittee with an eleven-page written statement, which he characterized as his objections to the questions asked of him. Whenever he was asked a question which he refused to answer, appellant asked permission, or attempted without permission, to read the prepared statement. The Chairman ruled that it was a preliminary statement, which, under the rules of the subcommittee (with which appellant admitted familiarity) had to be filed a reasonable time in advance

[3] Hearings Before the House Committee on Un-American Activities on Communist Methods of Infiltration (Education—Part 9), 83d Cong., 2d Sess. (1954), Gov. Exhibit No. 8.

of appearance before the subcommittee.[4] At one point appellant asserted:

> "I am objecting on these grounds, and I will not answer any questions about which the list of objections is read: my political beliefs; my religious beliefs; any other personal and private affairs; my associational activities.
>
> "I will not answer any of those questions on the grounds of my objections in this statement which I again respectfully request that I be able to read at this point to get into the record the objections so that we can proceed from that point."

This assertion by appellant was made before he was directed to answer the question set forth in the first count of the indictment.

Prior to making the objection referred to above, appellant had stated, in response to a question:

> "Sir, I would like here to state my objections to the power and jurisdiction of this committee to inquire into my political beliefs, my religious beliefs, and any other personal and private affairs . . ."

The Chairman, as stated, had regarded the written statement as a preliminary one and had ruled that it would be taken under advisement as to whether or not it might be inserted into the record. Faced with continued refusal to answer the questions and appellant's repeated attempts to read the lengthy statement, the Chairman waived compliance with the rules of the subcommittee and accepted the statement into the record. Thereafter, when appellant

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[4] The statement can best be described as a lengthy legal brief attacking the jurisdiction of the committee to ask appellant any questions or to conduct any inquiry at all, based on the First, Ninth and Tenth Amendments, the prohibition against bills of attainder, and the doctrine of separation of powers. This brief cited more than twenty Supreme Court decisions, some of which do not concern the congressional power of investigation; and, in several instances, dissenting opinions were cited.

refused to answer a question, he referred to the statement, as the subcommittee suggested that he do, as the basis of his refusal. The record reflects that one member of the subcommittee had read the statement but it does not show that the other members had done so. It is this upon which appellant relies when he argues that the subcommittee failed to consider his objections. With that position we cannot agree.

First, appellant did communicate to the subcommittee the general basis of the objections contained in his written statement. Secondly, one member of the subcommittee, shown by the record to have read the statement, indicated his belief that the statement contained no valid grounds for refusal to answer; and, in admitting the statement into the record, the Chairman indicated that he was relying on that member.

We cannot, within the limited power of a court to review the procedures of a congressional committee, insist that such a committee interrupt its proceedings for detailed examination of a lengthy attack on its power to ask a question or to make any inquiry at all.[5] Certainly the subcommittee had the right to insist that objections be cast in a reasonable form.

Thirdly, to the extent that appellant had an objection which was not actually communicated to the subcommittee, he has no one to blame but himself. The record does not disclose that the subcommittee denied appellant a right to object to questions or that it was in any way abusive in its treatment of him. On the contrary, the subcommittee demonstrated not only considerable patience but active interest in determining what appellant's objections were. This was true even to the extent that appellant was asked

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[5] *Cf. Eisler* v. *United States*, 83 U. S. App. D. C. 315, 170 F. 2d 273 (1948), *cert. dismissed*, 338 U. S. 883 (1949); *Barsky* v. *United States*, 83 U. S. App. D. C. 127, 167 F. 2d 241 (1948), *cert. denied*, 334 U. S. 843.

several times if the grounds for his objections encompassed the Fifth Amendment privilege against self-incrimination, which he stated they did not.

Briefly stated, our conclusions are: that appellant actually apprised the subcommittee of his objections; that the subcommittee found them unacceptable and directed appellant to answer; that the courts cannot require a committee to make a detailed study of what may be fairly described as a lengthy legal brief before it directs a witness to answer; that appellant had numerous opportunities to make known any additional objections he may have had but that he instead insisted upon reading his eleven-page statement; that that statement was read by one member of the subcommittee and found unpersuasive; and that the Chairman, relying on this member's knowledge of the statement, and its purport as communicated by the witness, directed an answer to each question. Therefore, we must hold that appellant's refusals to answer were at his own risk.

Quinn v. *United States, supra,* is not inconsistent with our view; we read that case as buttressing our conclusions. It concerned a witness who, instead of stating the grounds of his objections to questions of a congressional committee, represented his objections as being the same as those interposed by a previous witness, which objections had been vague and ambiguous. The Supreme Court held that, though Quinn had only vaguely asserted an objection based on the Fifth Amendment, the committee should have overruled his objection and specifically directed him to answer before he could be convicted for contempt of Congress. It is noteworthy that the Supreme Court stated:

> "But the fact that a witness expresses his intention [to object on grounds of the Fifth Amendment] in vague terms is immaterial so long as the claim is sufficiently definite to apprise the committee of his

intention. As every one agrees, no ritualistic formula is necessary in order to invoke the privilege." 349 U. S. at 164.

Consistent with *Quinn*, we conclude that appellant did apprise the subcommittee of his objections based on the First Amendment. Certainly there is no doubt here that the subcommittee, when it directed appellant to answer each question, knew that appellant objected. It knew the general bases of the objections and rejected them. It gave him an opportunity to make any objections not communicated. It then directed him to answer each question set forth in the indictment.

III

Appellant next contends that the primary purpose of the subcommittee's inquiry was to "expose" his beliefs and associations and that, therefore, the subcommittee exceeded the bounds of its investigative power. There can be no doubt that Congress has the power of inquiry and investigation when the inquiry or investigation is upon a subject concerning which Congress may legislate. The very resolution establishing the committee indicates that the subject under inquiry was one concerning which Congress could legislate. The fact that such an inquiry or investigation may reveal or "expose" some facts embarrassing to some one is incidental and without effect upon the validity of the inquiry.

Evidence was presented at the trial to show that the House Committee on Un-American Activities had been engaged in a continuing investigation into communist methods of infiltration and that one aspect of this investigation dealt with the field of education.[6] The trial court found that it was as a part of this larger and continuing study that appellant was called to testify.

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[6] Annual Report of the Committee on Un-American Activities for the Year 1953, H. R. Rep. No. 1192, 83d Cong., 2d Sess. (1954).

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The committee Chairman opened the first hearing on the subject of communist infiltration into the field of education on February 25, 1953, by stating the nature and purpose of the inquiry.[7]

Appellant urges that a statement in the Annual Report of the Committee to the effect that hearings were set up to demonstrate to the people of Michigan the infiltration into the field of education in Michigan "and the identity of those individuals responsible for its success . . ." shows that "exposure," not legislation, was the point and purpose of the hearings. This statement, in context, is part of an extended discussion of the whole activity of this committee and cannot be regarded as a statement of the sole or primary objective and, however, it may conflict with the broader objectives, does not justify reversal of appellant's conviction. Courts must presume congressional investigations to have valid legislative purposes. *Townsend* v. *United States,* 95 F. 2d 352, *cert. denied,* 303 U. S. 664 (1938). Since the statement relied on does not negate the presence of other, and we think legitimate, purposes of the inquiry, the presumption of valid purposes is still operative and unrebutted. A reading of the full report indicates that the primary purposes of the inquiry were in aid of legislative processes.

Examination of the report shows that legislative recommendations were made by the committee ". . . based upon investigations and hearings, in the year, 1954." It is unnecessary for present purposes to comment on those recommendations except to say that they called for significant legislation, and illustrate that the committee did in fact recommend legislation based upon investigations and hearings in 1954, perhaps including the very hearing at which appellant testified. Apparently "exposure," if a purpose of the hearing in question, was not the primary purpose.

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[7] For the statement of the Chairman see the appendix hereto.

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The subcommittee was investigating communist infiltration in the field of education, and did so pursuant to its duty to investigate the extent, character, and objects of un-American propaganda activities in the United States, and all other questions related thereto that would aid Congress in its legislative function. Taking this into consideration, together with the statement of the Chairman at the time the inquiry was inaugurated in February 1953, as well as the statement of the committee counsel on the morning appellant appeared to testify,[8] we conclude that the subcommittee's dominant purpose in examining appellant was to acquire information which it regarded as useful in formulating legislative recommendations. This is a more valid appraisal than would result from concentrating on one isolated statement in the Annual Report. So long as competent evidence establishes a substantial legislative purpose in calling a witness before a congressional committee, and in its examination of him, we will not balance this purpose against other motivations. Once it is proven that the committee felt induced to call a witness in order to acquire information in aid of legislative processes, we think our limited function is exhausted.

We are next asked to decide whether Congress possesses the power to investigate citizens who are engaged in the education systems of the country. Appellant maintains that Congress cannot do this because the field of education has been reserved to the states, and that, under the Tenth Amendment, Congress has no authority to legislate in that sphere.

We must ascertain specifically the subject under inquiry at the time appellant appeared as a witness before the

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[8] Communist Methods of Infiltration (Education—Part 9), note 3 *supra*, at 5754: "The field covered will be in the main communism in education and the experiences and background in the party by Francis X. T. Crowley. It will deal with activities in Michigan, Boston, and in some small degree, New York. Without further ado, Mr. Chairman, if I have your permission I will call the witness."

subcommittee. The official report of the Committee on Un-American Activities, which contains the testimony of appellant before the subcommittee, is entitled "Communist Methods of Infiltration (Education—Part 9)." This report indicates that, on the day appellant was heard by the subcommittee, the Chairman asked the committee counsel to state the purposes and reasons for the hearing. Counsel stated, among other things, that Crowley, a formerly recalcitrant witness, had volunteered to come before the subcommittee and that "[t]he field covered will be in the main communism in education and the experiences and background in the party by Francis X. T. Crowley." The same day that the subcommittee heard Crowley, it examined appellant. Thus, we see that the title given the inquiry, "Communist Methods of Infiltration (Education—Part 9)," was consistent with the announced subject of the inquiry at the time appellant appeared. Looking further, the nature, purpose, and hope of the committee, when it began this general, continuing inquiry in February 1953, can be determined by examining Government Exhibit No. 7.[9] We take these statements of the Chairman as conclusive of the purpose of the inquiry pursuant to which appellant was called as a witness.

The inevitable result is that the purpose and nature of the inquiry was to determine communist methods of infiltration in the field of education. There is no indication of a congressional desire or attempt to examine curricula, content of text books, administration of schools, or criteria for employing and discharging teachers. Indeed, the committee's official report on this investigation negatives any such interpretation of the intent of Congress. There is nothing to suggest that education, as such, was any more involved here than were labor unions and the motion picture industry in earlier inquiries by this same congressional committee. Convictions of witnesses called

[9] See appendix.

pursuant to both of these latter investigations have been affirmed in the courts.[10]

While it is true, as appellant points out, that Congress has broader powers to enact legislation in the field of labor than it does in the field of education, it is not true that persons who incidentally happen to be teachers have greater immunity from inquiry into their activities than do labor leaders and screen writers, when those activities relate to matters which are a legitimate concern of the Congress. By virtue of their great profession, teachers owe a higher duty, morally at least, to their country and its citizenry; but their status as teachers does not confer upon them a right not to have their separate or collateral activities inquired into when the same activities by others may be.

Shortly before appellant appeared before the subcommittee, its parent body had recommended to the Congress, and Congress had enacted, the Veterans' Readjustment Assistance Act of 1952, 66 Stat. 667,[11] which provides that educational stipends shall not be paid to veterans in attendance at educational institutions listed by the Attorney General as totalitarian, fascist, communist or subversive. This is significant in that it demonstrates a valid legislative interest in the incidence of communist infiltration into educational institutions and the number, location and identity of communists in the schools, in order that Congress might be informed of a deed to extend or repeal the Act.

American colleges and universities are holders of contracts with the Government to conduct a variety of research projects of far-reaching consequence to the national security. They are frequently petitioners for and recipients of substantial grants not directly related to national security but involving expenditures of tax reve-

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[10] See, *e.g.*, *Flaxer* v. *United States*, 235 F. 2d 821 (D. C. Cir. 1956); *Lawson* v. *United States*, 85 U. S. App. D. C. 167, 176 F. 2d 49 (D. C. Cir. 1949), *cert. denied*, 339 U. S. 972 (1950).

[11] 38 U. S. C. § 933.

nues. Thus, there are various other valid reasons for a congressional committee to launch an investigation of the type being conducted when appellant appeared as a witness. Congress has the recognized authority to conduct inquiries to determine if projects crucial to national defense, and paid for from public funds, are being carried forward with dispatch and in a manner consonant with safeguarding those projects from those whom Congress might regard as subversive or potential enemies. Therefore, it is important for Congress to know the methods, nature and extent of communist infiltration of colleges and universities which are or might become engaged in secret defense projects.

IV

Appellant's final contention is that the resolution establishing the Committee on Un-American Activities and conferring on it jurisdiction to make investigations is, on its face, contrary to the First and Fifth Amendments to the Constitution of the United States. This very contention has been urged upon this and other courts and has been consistently rejected.[12]

It is urged that a committee of Congress has no constitutional authority to require an answer of a witness as to his political beliefs and associations. In *Quinn* v. *United States*, 349 U. S. at 160-161, the Supreme Court said:

> "There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with

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[12] *Marshall* v. *United States*, 85 U. S. App. D. C. 184, 176 F. 2d 473 (D. C. Cir. 1949), *cert. denied*, 339 U. S. 933 (1950); *Dennis* v. *United States*, 84 U. S. App. D. C. 31, 171 F. 2d 986 (D. C. Cir. 1949), *aff'd*, 339 U. S. 162 (1950); *United States* v. *Josephson*, 165 F. 2d 82 (2d Cir. 1947), *cert. denied*, 333 U. S. 838 (1948); and cases cited notes 5 and 10 *supra*.

the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.

"But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs *unrelated to a valid legislative purpose. . . .*" [Emphasis supplied.]

From this, it appears that if there is a valid legislative purpose, then, as was held in *Barsky,*[13] Congress can inquire into "private affairs" and, of course, political views and assocations. If Congress can legislate against a threat of communism which is reasonably apprehended, it can, consistently with the meaning of the Constitution and the language in the *Quinn* case quoted above, inquire of a witness whether or not he is a communist, subject to the constitutional limitations imposed by the privilege against self-incrimination.

We said in *Barsky:*

". . . We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part, and inquiry into the desirability vel non of other forms of government is a power of Congress under its mandate to initiate amendments if such become advisable.

". . .

"If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject. . . ." 167 F. 2d at 246.

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[13] *Barsky* v. *United States,* note 5 *supra.*

Appendix B

Appellant asks that we re-evaluate *Barsky* bearing in mind that the subcommittee record indicates that appellant's participation, if any, in communist groups was confined to the intellectual and ideological realm and was not conspiratorial in nature. We reaffirm *Barsky,* and see nothing which places appellant beyond the ruling therein.

If the Haldane Club of the Communist Party, to which appellant allegedly belonged, was in fact principally a Marxist study group and, as believed by the subcommittee, an adjunct of the Communist Party, we cannot say that the identity of its members and the extent and nature of their participation were not matters of legitimate concern to the subcommittee under its enabling resolution. Whether the Communist Party embraces not only conspiratorial groups but intellectual discussion groups as well, the relationship between them, the group most prevalent, and the extent to which an individual might participate in the activities of each, whether such groups operate within or are connected with public educational institutions, place the questions asked appellant clearly within the pale of valid inquiry.

Though we, of course, agree that Congress does not have a general power to inquire into political beliefs and associations, it does have that power where the answer to the question posed can be and is regarded by Congress as having value in the exercise of legislative duty. Congress can legislate on the internal security dangers it has declared to have arisen from the activities of the Communist Party in this country. It can and it has.

Our view of the record convinces us that the indictment was in no respect defective; that appellant either communicated or could have communicated all his objections to questions asked him and that the committee indicated his objections were untenable; that, if the committee was motivated in part by a purpose of exposure in calling appellant as a witness, it was also properly motivated by a desire for information which it reasonably believed

would be helpful to it in the discharge of its duty to make legislative recommendations; and that the subject matter under investigation was not beyond the scope of permissible congressional inquiry under the committee's enabling resolution, which resolution is within its constitutional powers.

The conclusion dictated is that the judgment appealed from is correct and is therefore

Affirmed.

APPENDIX

Hearings Before the House Committee on Un-American Activities, Communist Methods of Infiltration (Education), 83d Cong., 1st Sess. (1953), pp. 1-3.

Opening Statement of the Chairman, February 25, 1953

"Mr. Davis [the first witness called], it is our understanding that you are a member of the teaching profession. In opening this hearing, it is well to make clear to you and others just what the nature of this investigation is.

"From time to time, the committee has investigated Communists and Communist activities within the entertainment, newspaper, and labor fields, and also within the professions and the Government. In no instance has the work of the committee taken on the character of an investigation of entertainment organizations, newspapers, labor unions, the professions, or the Government, as such, and it is not now the purpose of this committee to investigate education or educational institutions, as such. The committee will follow its long-established policy of investigating Communists and Communist activities wherever it has substantial evidence of its existence.

"When investigating Communists and Communist activities within certain labor unions, the committee was met with the charge by alarmists and partisans within that field that the committee was a group of Fascists and the enemy of labor, and that the real purpose of the in-

vestigation was to destroy labor unions. Similar and equally unfounded charges have been made with regard to this hearing. In pursuing its work within the field of labor, the committee carefully refrained from taking any part in any internal disputes within labor or any disputes between employers and employees and confined its activities to the ascertainment and identification of leaders in the labor unions who were members of the Communist Party and were using their influence to promote the objectives of the Communist Party within the field of labor, and to the character, extent, and objects of their Communist Party activities. The work of the committee in this respect has met with such growing success that many labor unions are now actively engaged in eliminating from positions of influence union officials known to be members of the Communist Party and engaged in Communist activities.

"The purpose of the committee in investigating Communists and Communist activities within the field of education is no greater and no less than its purpose in investigating Communists and Communist activities within the field of labor or any other field.

"The committee is charged by the Congress with the responsibility of investigating the extent, character, and objects of un-American propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"It has been fully established in testimony before congressional committees and before the courts of our land that the Communist Party of the United States is part of an international conspiracy which is being used as a tool or weapon by a foreign power to promote its own foreign policy and which has for its object the overthrow of the governments of all non-Communist countries, resorting to

the use of force and violence, if necessary. This organization cannot live except by the promulgation and diffusion of subversive and un-American propaganda and in the view of this committee every person who remains a member of it is contributing to the ultimate accomplishment of its objectives. Communism and Communist activities cannot be investigated in a vacuum. The investigation must, of necessity, relate to individuals and, therefore, this morning the committee is calling you as a person known by this committee to have been at one time a member of the Communist Party.

"The question is sometimes asked whether it is necessary to call as witnesses those who are no longer members of the Communist Party. It is quite obvious for a number of reasons that the answer should be 'Yes.' Such witnesses add immeasurably to the sum total of the knowledge of the character, extent, and objects of Communist activities. The testimony of former Communist Party members resulted virtually in immobilizing the Communist Party in Hollywood. These witnesses considered it their patriotic duty to answer under oath questions relating to their knowledge of Communist infiltration into the organizations of which they had been members, and to their knowledge of other Communist Party activities. Witnesses from the Screen Writers' Guild, the directors' guilds, labor unions, the legal profession, the medical profession, and other groups have made a great contribution to the defense of their country by disclosing to this committee facts within their knowledge.

"Former Communist Party membership, in the view of the committee, should not be held against an individual whose testimony admitting former Communist Party membership has that character of truthworthiness which convinces one that he has completely and finally terminated his Communist Party membership and has been given in all good faith. It is of great aid in determining who remain in the Communist Party to ascertain who have left it.

Appendix B

"The committee was greatly concerned with the evidence developed in the Hollywood hearings with respect to the type of 'thought control' practiced by the Communist Party upon its members. Screen writers were told how and what they should write. The testimony of Budd Schulberg and Edward Dmytryk demonstrate the point as clearly as laboratory experiments would prove a chemical reaction. The same influence was found to exist in the field of art and music. An objective study of this testimony will lead to the inescapable conclusion that it is the Communist Party which is the enemy of academic freedom.

"The committee is equally concerned with the opportunities that the Communist Party has to wield its influence upon members of the teaching profession and students through Communists who are members of the teaching profession. Therefore, *the objective of this investigation is to ascertain the character, extent and objects of Communist Party activities when such activities are carried on by members of the teaching profession who are subject to the directives and discipline of the Communist Party.*" [Emphasis supplied.]

(Oral Opinion of the District Court)

This defendant is on trial before the Court on a charge of contempt of Congress, in that he declined to answer certain questions as a witness before a subcommittee of the House Committee on Un-American Activities. The questions are as follows:

"Are you now a member of the Communist Party?"

"Did you know Francis Crowley as a member of the Communist Party?"

"Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan?"

"Were you a member while a student of the University of Michigan Council of Arts, Sciences, and Professions?"

The evidence shows that these questions were asked; that the defendant deliberately and intentionally refused to answer; that he was then directed to answer the questions by the chairman of the subcommittee, and that he persisted in his refusal.

Some of the questions of law here raised were also raised in the case of *United States* against *Harry Sacher*, which was tried a few days ago, and I refer to my remarks at the conclusion of that trial for the disposition of those questions. Two or three additional points are raised here that were not involved in the *Sacher* case. The first is the question of pertinency of the questions addressed to the witness.

The House Committee on Un-American Activities is authorized by Rule 17(b), either as a whole or by subcommittee, to make investigations of the extent, character, and objects of un-American propaganda activities in the United States; the diffusion within the United States of subversive and un-American propaganda; and all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The authority of the House Committee on Un-American Activities to inquire of witnesses as to whether they were members of the Communist Party has been established and reiterated time and time again by the Court of Appeals and by the Supreme Court. *Lawson* versus *United States,* 179 Federal (2d) 49, and *Emspak* versus *United States,* 203 Federal (2d) 54, are some of the authorities so holding. The questions are therefore pertinent on their

face. But even beyond that certain documents were introduced in behalf of the Government to show the specific basis for the particular inquiries of the defendant, namely, that the committee was investigating alleged infiltration of the Communist movement into educational institutions, and the witness was being interrogated concerning those matters, he being a member of the educational profession. The evidence further shows that the testimony elicited by the committee was actually being used by the committee in connection with legislative recommendations.

The next point that is raised is that the hearing, although it started as a hearing before the full committee, was transferred into a hearing before a subcommittee. There is no variance between the proof and the indictment, because the indictment alleges that the hearing was being conducted by a subcommittee. The rules expressly authorize the committee to act through a subcommittee, and in the absence of any rule as to how a subcommittee should be appointed, it would necessarily follow that the chairman of a committee would have the right to appoint subcommittees. Moreover, the Court is impressed by the opinion of Chief Justice Vinson in *United States* versus *Bryan*, 339 U. S. 323, to the effect that technical questions and objections relating to the jurisdiction or composition of a committee or subcommittee must be raised at the hearing instead of later on in the trial, on a charge of contempt.

As the courts have held time and time again, while the contempt must be willful, it does not mean that there must be proof of bad faith or dishonest motives. Even if a witness acts in good faith, that is not a defense and does not negative willfulness. Wilfullness consists in an intentional, deliberate refusal, rather than an inadvertent or accidental refusal, or a refusal that was unintentional or based on a misunderstanding.

In the light of all the evidence, the Court finds the defendant guilty on all counts.

Appendix C

The constitutional, statutory provisions and rules involved read in relevant part:

CONSTITUTION OF THE UNITED STATES OF AMERICA.

• • •

Article I, Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

• • •

Article II, Section 1. The executive power shall be vested in a President of the United States of America.

• • •

Article III, Section 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish.

• • •

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

• • •

Amendment 5. No person shall . . . be deprived of life, liberty, or property without due process of law.

Amendment 6. In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . .

Amendment 10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Appendix C

2 U. S. C. Section 192, R. S. 102 (52 Stat. 942), as amended:

"Refusal of witness to testify.

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828) and House Resolution 5 of the 83rd Congress:

"(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:

"RULE XI

"*Power and Duties of Committees*

"(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively . . .

"(q)(1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make

from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Rule 7(c) of the Federal Rules of Criminal Procedure provides in relevant part:

"Rule 7. The indictment and the Information

(c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . ."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 742

LLOYD BARENBLATT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 27–46) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1957 (Tr. 240). The petition for a writ of certiorari was filed on February 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether it sufficiently appears from the record of the proceedings at which petitioner refused to

answer questions that the House Committee on Un-American Activities, in asking petitioner whether he was or ever had been a member of the Communist Party, was acting pursuant to a valid legislative purpose.

2. Whether the indictment was fatally defective in that—

(*a*) it allegedly failed to state the nature of the "question under inquiry" at the time of petitioner's refusals to answer;

(*b*) it failed to aver specifically that the refusals to answer were "intentional" and "knowing";

(*c*) it charged that the refusals to answer occurred before "a subcommittee" of the Committee on Un-American Activities.

3. Whether it sufficiently appears from the record that the subcommittee considered the reasons advanced by petitioner as to why he should not be required to answer.

4. Whether House Rule XI, defining the powers of the House Committee on Un-American Activities, is unconstitutional "on its face" on the ground that it makes of the Committee a "national arbiter of acceptability of political thought"; and whether 2 U. S. C. 192, read in conjunction with House Rule XI, is unconstitutionally vague.

STATUTE AND RULE INVOLVED

2 U. S. C. 192 (R. S. 102, as amended) and the pertinent provisions of Rule XI of the Rules of the

House of Representatives[1] (as amended by the Legislative Reorganization Act of 1946, c. 753, § 121, 60 Stat. 812, 822, 823, 828) are set forth in Appendix C to the petition for certiorari (Pet. 50–51).

STATEMENT

Petitioner was charged in a five-count indictment (Tr. 201–2), returned in the United States District Court for the District of Columbia, with having refused, in violation of 2 U. S. C. 192 (Pet. 50), to answer five questions, pertinent to the matter under inquiry, put to him by a subcommittee of the Committee on Un-American Activities of the House of Representatives—whether he then was or ever had been a member of the Communist Party (counts 1 and 2), whether he had known one Francis Crowley as a member of the Communist Party (count 3), and whether he (petitioner) had ever been a member, while a student at the University of Michigan, of the "Haldane Club of the Communist Party" (count 4) or of the "Council of Arts, Sciences, and Professions" (count 5). Petitioner, having waived his right to a trial by jury (Tr. 145–146), was found guilty by the court on all counts (Tr. 192) and was sentenced generally to six months' imprisonment and to pay a fine of $250 (Tr. 199, 215). On appeal to

[1] These Rules were adopted by the House at the commencement of the Eighty-Third Congress as the rules of the House for that Congress (H. Res. 5, 83d Cong., 1st sess. (G. Ex. 2, Tr. 42, 44), 99 Cong. Rec. 15, 16, 18, 24). It was during that Congress that the refusals to answer questions here involved occurred (June 28, 1954).

the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was affirmed.

The pertinent facts may be summarized as follows:

On February 25, 1953, the Committee on Un-American Activities of the House of Representatives commenced a series of public hearings in connection with an investigation which it was conducting into "Communist Methods of Infiltration" into the field of "Education" (G. Ex. 7, p. 1; Tr. 50).[2] Immediately prior to interrogating the first witness, Representative Velde, the Committee Chairman, made an opening statement setting forth the nature and purpose of the investigation (*id.*, pp. 1–3).[3] The investigation, the Chairman said, was one of a series of investigations which the Committee had been conducting into "Communists and Communist activities wherever it has substantial evidence of its existence" (*id.*, p. 1). "The purpose of the committee in investigating Communists and Communist activities within the field of education is no greater and no less than its purpose in investigating Communists and Communist activities within the field of labor or any other field" (*id.*, p. 2). Pointing out that "[t]he committee is charged by the Congress with the responsibility of investigating the extent, character, and objects of un-American

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[2] Government Exhibit 7 is the printed transcript (part 1) of the Hearings before the Committee on Un-American Activities, House of Representatives, 83d Cong., 1st sess., February 25, 26, and 27, 1953, entitled *Communist Methods of Infiltration (Education)*.

[3] This statement by the Committee Chairman is reproduced in full as an appendix to the opinion of the Court of Appeals (Pet. 43–46).

propaganda activities in the United States, the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and all other questions in relation thereto that would aid Congress in any necessary remedial legislation," the Chairman observed (*id.*, p. 2):

> It has been fully established in testimony before congressional committees and before the courts of our land that the Communist Party of the United States is part of an international conspiracy which is being used as a tool or weapon by a foreign power to promote its own foreign policy and which has for its object the overthrow of the governments of all non-Communist countries, resorting to the use of force and violence, if necessary. * * *

The Chairman further observed that, since "Communism and Communist activities cannot be investigated in a vacuum," the "investigation must, of necessity, relate to individuals" (*ibid.*). "[T]he objective of this investigation," the statement concluded, "is to ascertain the character, extent and objects of Communist Party activities when such activities are carried on by members of the teaching profession who are subject to the directives and discipline of the Communist Party" (*id.*, p. 3).

The Committee thereupon proceeded with the taking of testimony (*id.*, p. 3). Witnesses heard on that day and from time to time thereafter during the year 1953 presented to the Committee "facts within their

own knowledge concerning Communist efforts to infiltrate and dominate the teaching profession within the United States" (G. Ex. 9, p. 9; Tr. 61).[4] Illustrative of the testimony was that of the first witness, Robert Gorham Davis, who admitted that he had been, from 1937 to the fall of 1939, a member of a Communist cell on a university campus which included faculty members, teaching fellows, and graduate students (G. Ex. 7, pp. 4, 6). The members of this cell, Davis testified, received instructions and directives from the Communist Party through a paid functionary of the Party (*id.*, pp. 8, 35). From time to time, they were addressed by Party functionary Philip Frankfeld, whose purpose it was to "educate" them politically (*id.*, pp. 8, 10).[5] They would seek to attain positions of leadership in various organizations for the purpose of seeing to it that the policies of such organizations "would be as close to the policies desired by the Communist Party as possible" (*id.*, p. 9). Their primary target in this respect was the local "Teachers' Union" (*id.*, pp. 10, 30). Prior to meetings of the Teachers' Union, the members of the cell used to discuss the policies which they would urge on the Union and the candidates which they would propose and support (*id.*, pp. 9, 11). They would also "endeavor to control the selection of delegates

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[4] Government Exhibit 9 is the *Annual Report of the Committee on Un-American Activities for the Year 1953* (H. Rep. No. 1192, 83d Cong., 2d sess.).

[5] Frankfeld was one of the defendants convicted in a Smith Act trial. See *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4), certiorari denied, 344 U. S. 922.

from the local Teachers' Union" to "district" and "national conventions" (*id.*, p. 11). At a caucus of the Communist members of the Teachers' Union preceding a certain convention in New York City which Davis attended, Jack Stachel addressed the group for the purpose of "determin[ing] the policies of the Communists" (*id.*, pp. 19–21).[6]

Davis testified that the following "sum[ming] up" of "the substance" of his testimony by Committee member Jackson was accurate: that the Communist Party (1) sought to "recruit teachers and professors" into the Party, (2) "la[id] down certain broad policies which these teachers and professors were expected to follow," (3) expected such recruited teachers to "infiltrate other teacher groups with the idea of putting forward policies and directives enunciated by the Communist Party," (4) "exercise[d] generally, on behalf of the Communist Party, what influence they could," and (5) "influence[d], to the extent possible, the election of group leaders * * * who were individuals known to be favorable to the policies of the Communist Party" (*id.*, p. 41).

During 1954, the Committee continued its inquiry into Communism in education. On June 28, 1954, Francis Crowley testified before the Committee, *inter alia*, that in 1950 he and petitioner had been fellow members of the "Haldane Club of the Communist Party," consisting of graduate students and teaching

[6] Stachel was one of the defendants in the Smith Act prosecution which culminated in *Dennis* v. *United States*, 341 U. S. 494.

fellows at the University of Michigan (G. Ex. 8, pp. 5773, 5777–8; Tr. 58).[1] On the same day, petitioner, appearing as a witness before the Committee, admitted that he had been a teaching fellow at the University of Michigan from 1948 to 1950 (*id.*, p. 5813) and that he knew Crowley (*id.*, p. 5802), but refused to state, after having been specifically ordered to do so, whether he then was or ever had been a member of the Communist Party (*id.*, pp. 5805–6, 5812) and to answer the other questions forming the subject-matter of the various counts of the indictment (*id.*, p. 5812; see supra, p. 3). In so refusing, he specifically disclaimed reliance on the Fifth Amendment's prohibition against compulsory self-incrimination (*id.*, pp. 5805, 5806). His refusals were based, he said, on his belief that the questions asked involved an inquiry into his "political beliefs," "religious beliefs," "personal and private affairs," and "associational activities," and that any such inquiry was "beyond the powers of this committee" (*id.*, pp. 5806, 5807).

ARGUMENT

1. Petitioner's principal contention—that the Committee lacked a valid legislative purpose in asking the questions which he refused to answer (Pet. 12–20)—is refuted by the record. As pointed out in the Government's brief on the merits (pp. 28–30) in

[1] Government Exhibit 8 is the printed transcript of the Hearings before the Committee on Un-American Activities, House of Representatives, 83d Cong., 2d sess., June 28 and 29, 1954, entitled *Communist Methods of Infiltration (Education—Part 9)*.

Watkins v. *United States,* No. 261, this Term, the purpose of a congressional inquiry must be gathered from the record of the committee hearing and the committee's authorization, hospitably read. The record of this Committee's 1953–54 inquiry into Communism in education, pertinent portions of which have been summarized, *supra,* at pp. 4–8, shows that the purpose of the Committee, in the series of hearings of which petitioner's interrogation was an integral part, was to inquire into the facts concerning Communist infiltration into the field of education, in order to determine what remedial legislation, if any, was necessary.

It certainly can no longer be denied, and we do not understand that petitioner now questions, that Congress has power to inquire into, and to legislate with respect to, the subjects of Communism and the Communist Party. See cases cited at p. 61 of our brief in No. 261. But if Congress has power to inquire into these subjects, as was observed in *Barsky* v. *United States,* 167 F. 2d 241, 246 (C. A. D. C.), certiorari denied, 334 U. S. 843:

> * * * it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject.

"If Congress can legislate against a threat of communism which is reasonably apprehended," as the

Court of Appeals pointed out in this case, reaffirming its *Barsky* decision (Pet. 41):

> * * * it can, consistently with the meaning of the Constitution and the language in the *Quinn* case [*Quinn* v. *United States*, 349 U. S. 155] quoted above,[8] inquire of a witness whether or not he is a communist, subject to the constitutional limitations imposed by the privilege against self-incrimination.

This is not to say that Congress has any "general power to inquire into political beliefs and associations" (opinion below, Pet. 42). But it clearly does have the power to inquire into the nature, character, and activities of, the seriousness of the danger emanating from, and all other aspects (including the number and identity of its members) of the particular organization known as the Communist Party of the United States. See cases cited at pp. 63–64 of our *Watkins* brief. Congress, in short, as said by the court below (Br. 64):

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[8] The language referred to is as follows (349 U. S. at 160–161):

"There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed co-extensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively.

"But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs *unrelated to a valid legislative purpose* * * *." [Emphasis added by court below.]

> * * * does have that power [to inquire into political beliefs and associations] where the answer to the question posed can be and is regarded by Congress as having value in the exercise of legislative duty. Congress can legislate on the internal security dangers it has declared to have arisen from the activities of the Communist Party in this country. It can and it has.

The fact that the focus of inquiry here involved was the field of education—as distinguished, for example, from the labor movement, government, or the armed forces—does not make these settled principles inapplicable. The Committee, as its Chairman emphasized at the outset of the hearings (Ex. 7, p. 1), was not investigating education as such, but Communist penetration into this field. "[I]t is not now the purpose of this committee," he pointed out, "to investigate education or educational institutions, as such. The committee will follow its long-established policy of investigating Communists and Communist activities wherever it has substantial evidence of its existence. * * * The purpose of the committee in investigating Communists and Communist activities within the field of education is no greater and no less than its purpose in investigating Communists and Communist activities within the field of labor or any other field" (*id.*, pp. 1–2; appendix to opinion below, Pet. 43–44).

The problem of Communist infiltration into the field of education is certainly one with respect to which Congress can and has legislated. For example, § 228 of the Veterans' Readjustment Assistance Act of 1952, 66 Stat. 667, 38 U. S. C. 933, prohibits the payment by

the Veterans Administration of any educational and training allowance to any otherwise eligible veteran who enrolls for any course in any educational institution which is listed by the Attorney General as totalitarian, Fascist, Communist, or subversive. This legislation was enacted pursuant to this Committee's recommendation that Congress should "[w]ithhold all Federal financial support from any educational institution which permits members of its faculty to advocate communism, fascism, or nazism as a substitute for our form of government to the student body * * *" (*Annual Report of the Committee on Un-American Activities for the Year 1953,* H. Rep. 1192, 83d Cong., 2d sess. (G. Ex. 9), pp. 144–5). The subject, moreover, would clearly be germane to congressional consideration of the various pending bills providing for federal aid to education, as well as to the subject of grants-in-aid to, or contracts with, institutions of higher learning.

In addition, the record of the hearing at which petitioner's refusals to answer occurred shows that immediately following those refusals, Committee member Doyle, with the concurrence of Chairman Velde, observed that (G. Ex. 8, p. 5813):

> * * * the record should show that at this time there are pending before the United States Congress several active bills dealing with the question of subversive activities, dealing with the question of the Communist Party, * * * and I would like the record of this hearing of this committee to especially show * * * that this witness [petitioner] and these other witnesses could help us in line with our * * * responsi-

> bility to have hearings with reference to recommendations for legislation in this area * * *.

Chairman Velde added that, on the basis of information in the Committee's files, it was clear that (*id.*, pp. 5813–4):

> * * * the witness [petitioner] has information about Communist activities in the United States of America, particularly while he attended the University of Michigan * * * which * * * would be very valuable to this committee and its work.

Petitioner's contention that the Committee's purpose in questioning him was not a legitimate one is based solely on a single, isolated, sentence in the Committee's 1954 *Annual Report* (H. Rep. No. 57, 84th Cong., 1st sess. (G. Ex. 10)), in which it was stated that "[t]he 1954 hearings were set up by the committee in order to demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success" (G. Ex. 10, p. 15; Pet. 12). This reliance, however, is misplaced. A purpose on the part of a congressional investigating committee to inform the public of pertinent facts relating to an area of inquiry can obviously coexist with its primary purpose of acquainting the Congress with those facts as part of the general process of investigation in aid of legislation. The Court of Appeals correctly said, with reference to the statement in the *Annual Report* on which petitioner relies (Pet. 36):

> * * * This statement, in context, is part of an extended discussion of the whole activity of this

committee and cannot be regarded as a statement of the sole or primary objective and, however it may conflict with the broader objectives, does not justify reversal of appellant's conviction. Courts must presume congressional investigations to have valid legislative purposes. *Townsend* v. *United States*, 95 F. 2d 352, *cert. denied*, 303 U. S. 664 (1938). Since the statement relied on does not negate the presence of other, and we think legitimate, purposes of the inquiry, the presumption of valid purposes is still operative and unrebutted. A reading of the full report indicates that the primary purposes of the inquiry were in aid of legislative processes.

Since "the primary purposes of the inquiry were in aid of legislative processes," as the record as a whole indicates, the fact that an incidental, coexistent purpose may have been to "demonstrate to the people of Michigan the fields of concentration of the Communist Party in the Michigan area, and the identity of those individuals responsible for its success" could not have rendered the questions illegitimate, so as to have justified petitioner's refusal to answer them, even if it be assumed, *arguendo*, that the latter purpose, had it been the sole one, would not be valid.

2. Also without merit are petitioner's contentions that the indictment was fatally defective on several grounds (Pet. 21–23).

(*a*) First, it is argued, there was a fatal "failure to allege the question under inquiry" (Pet. 21).

The indictment alleged that the Committee, on June 28, 1954, "was conducting hearings, pursuant to Pub-

lic Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828), and to H. Res. 5, 83d Congress," and that petitioner appeared and refused to answer questions "which were pertinent to the question then under inquiry" (Tr. 201). The reference to "Public Law 601, Section 121, 79th Congress, 2d Session (60 Stat. 828)" and "H. Res. 5, 83d Congress" was a reference to the House Rule (XI) under which the Committee operates. See *supra*, pp. 2–3, including fn. 1; Pet. 50–51. That Rule confers on the Committee the authority to investigate "the extent, character, and objects of un-American propaganda activities in the United States," "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution," and "all other questions in relation thereto that would aid Congress in any necessary remedial legislation" (Pet. 51).

It is submitted that this was a sufficiently explicit statement of the "question under inquiry" to satisfy the requirement of Rule 7 (c) of the Federal Rules of Criminal Procedure (see Pet. 51), which states, in pertinent part, that "[t]he indictment or information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."* Furthermore, petitioner has never

* *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2), relied on by petitioner (Pet. 21), is distinguishable. That case involved a refusal to answer questions before the Permanent Subcommittee on Investigations of the Senate Committee on Government Opera-

contended, and does not now contend, that he was unaware of the nature of the "question under inquiry" before the Committee. Under Rule 52 (a), F. R. Crim. P., therefore, the alleged defect, even if it were in fact such, should be disregarded."

(*b*) Secondly, it is urged (Pet. 21–23), there was a fatal "failure to allege an intentional, 'knowing' refusal to answer" (Pet. 21). But the indictment did charge that petitioner "unlawfully" refused to answer the questions (Tr. 201), and for the refusals to have been unlawful they had to be deliberate. *Quinn* v. *United States,* 349 U. S. 155, 165–166. The intentional character of the refusals was thus charged implicitly. *United States* v. *Deutch,* 235 F. 2d 853 (C. A. D. C.). In any event, petitioner does not claim that he was in any way misled or prejudiced by the failure of the indictment to use the word "intentional" or "knowing," nor does he suggest that his refusals were not in fact intentional and deliberate. In the light of Rule 52 (a), F. R. Crim. P.

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tions. The court held that, since the questions which Lamont had refused to answer did not on their face appear to have been in any way related to the scope of the committee's authority, the indictment was insufficient for failure to set forth in what way they were germane (236 F. 2d at 315–317). The court observed that "[t]he result might well be different were this a case of a committee created by Congress to hold hearings for a specific purpose, with the inquiry in question apparently falling within the assigned purpose" (236 F. 2d at 316, n. 6, citing, *inter alia*, *United States* v. *Josephson*, 165 F. 2d 82 (C. A. 2), certiorari denied, 333 U. S. 838, which the opinion described parenthetically as relating to "un-American activities").

[9] Rule 52 (a) provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

(see fn. 10, *supra*, p. 16), therefore, the present contention is clearly without substance. See also *Hagner v. United States*, 285 U. S. 427, 431.[11]

(*c*) Finally, it is contended, the indictment was fatally deficient in that it charged that petitioner's refusals to answer occurred before "a subcommittee" of the Committee on Un-American Activities, whereas the statute involved (2 U. S. C. 192; see Pet. 50) "defines the crime as a refusal to answer before a 'committee'" (Pet. 23). But clearly, as pointed out by the Court of Appeals (Pet. 31), "Congress intended the word 'committee' in its generic sense, which would include subcommittees." This conclusion flows from a consideration of the evident purpose of 2 U. S. C. 192, which, as the Court of Appeals further observed, "was to discourage the impairment of the vital investigative function of Congress," which "is as often committed to subcommittees as it is to full committees of Congress, as indeed it must be" (Pet. 30).

Moreover, petitioner's contention is directly refuted by the terms of the companion section to 2 U. S. C. 192, 2 U. S. C. 194, which provides for certification of the relevant facts to the appropriate United States

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[11] "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

Attorney for prosecution "[w]henever a witness summoned as mentioned in section 192 of this title * * * refuses to answer any question pertinent to the subject under inquiry before either House, * * * or any committee *or subcommittee* of either House * * *" (emphasis added).

3. Petitioner next contends (Pet. 23–24) that there was a "failure to prove contumacy" (Pet. 23) because, allegedly, "[i]t appears from the record that the subcommittee never even considered the objections to the questions offered by the petitioner" (Pet. 24). This contention is fully discussed in the opinion of the Court of Appeals (Pet. 31–35), and is clearly untenable. Petitioner orally announced, in the presence of all members of the subcommittee, that he was refusing to answer the Committee's questions on the ground that, in his judgment, the Committee lacked "the power and jurisdiction * * * to inquire into my political beliefs," "my religious beliefs," "any other personal and private affairs," and "my associational activities" (G. Ex. 8, pp. 5802, 5806). The Committee was thus clearly apprised of the nature of petitioner's "objections" to the questions before he was directed to answer.

The substance of petitioner's present complaint is simply that he was not permitted to read to the Committee a document, aptly described in the record as "an 11-page legal brief" (*id.*, p. 5804), purporting to substantiate his contention with legal authority. That document, bearing the title "Objection to Jurisdiction of the Committee on Un-American Activities and to

Questions Propounded by It" (*id.* p. 5807), was received by the Committee and was incorporated into the record of the hearing (*id.*, pp. 5807–5810). It is, indeed, a legal brief, replete with legal authorities and quotations from court decisions, which allegedly supported petitioner's contention, orally communicated by him to the Committee's members, that the Committee was without "power and jurisdiction" to inquire into his "political beliefs," "religious beliefs," "other personal and private affairs," and "associational activities." Since it is clear from the record that the essential nature and substance of petitioner's objections to the Committee's questions were in fact made known, the Court of Appeals was correct in concluding that "the courts cannot require a committee to make a detailed study of what may be fairly described as a lengthy legal brief before it directs a witness to answer * * *" (Pet. 34).

Furthermore, the record indicates that, at the time petitioner sought to read the document in question to the Committee, at least one member had in fact read it and was "well acquainted with what is in it" (G. Ex. 8, p. 5806). The Chairman indicated that, while he himself had "not had an opportunity to read the full statement," he would "take the word of" the member who had read it as to the nature of its contents (*id.*, p. 5807). The statement was, as we have noted, received in evidence and spread on the record of the hearing. In these circumstances, there can be no question that it was a proper exercise of discretion for the Committee members to decline to permit petitioner to read his "brief" to them.

4. Petitioner also contends (Pet. 10–11) that the Rule defining the powers of the Committee on Un-American Activities (House Rule XI; see Pet. 50–51) is unconstitutional "on its face" because it requires that the Committee, in order to be able to investigate "subversive" and "un-American" propaganda, become a "national arbiter of acceptability of political thought" (Pet. 10). Substantially the same contention has, as petitioner recognizes (*ibid.*), repeatedly been rejected by the courts. *E. g., Barsky* v. *United States,* 167 F. 2d 241, 247–251 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson,* 165 F. 2d 82, 87–88 (C. A. 2), certiorari denied, 333 U. S. 838; *Dennis* v. *United States,* 171 F. 2d 986, 987–988 (C. A. D. C.), affirmed on other grounds, 339 U. S. 162; *Lawson* v. *United States,* 176 F. 2d 49, 52–53 (C. A. D. C.), certiorari denied, 339 U. S. 934; *Morford* v. *United States,* 176 F. 2d 54, 56 (C. A. D. C.), reversed on other grounds, 339 U. S. 258; *Marshall* v. *United States,* 176 F. 2d 473, 474 (C. A. D. C.), certiorari denied, 339 U. S. 933. See also the Government's brief in *Watkins* v. *United States,* No. 261, this Term, at pp. 61–68.

A related contention, barely mentioned in the petition (Pet. 11–12), is that 2 U. S. C. 192, "read in conjunction with" House Rule XI, is unconstitutionally vague. This contention has likewise been repeatedly rejected by the courts. *E. g., Barsky* v. *United States, supra,* 167 F. 2d at 247–248; *Dennis* v. *United States, supra,* 171 F. 2d at 987–988; *Lawson* v. *United States, supra,* 176 F. 2d at 52–53; *Morford* v. *United States, supra,* 176 F. 2d at 56; *Marshall* v.

United States, supra, 176 F. 2d at 474; *Emspak* v. *United States,* 203 F. 2d 54, 56 (C. A. D. C.), reversed on other grounds, 349 U. S. 190; see also *United States* v. *Josephson, supra,* 165 F. 2d at 87–88. In *Emspak* and its companion cases, the issue was argued but was not reached by this Court (see *Emspak,* 349 U. S. 190, 202; *Quinn* v. *United States,* 349 U. S. 155, 170; *Bart* v. *United States,* 349 U. S. 219, 223). As applied to petitioner, we submit that the statute and rule, read together, are clearly valid for the reasons set forth in the Brief for the United States in *Emspak,* No. 9, Oct. Term, 1954 (No. 67, Oct. Term, 1953), pp. 66–71, 78–95. The same issue is involved in *Watkins* v. *United States,* No. 261, this Term, and the Brief for the United States in that case, at pp. 71–73, summarizes our arguments on the point.

CONCLUSION

The case was correctly decided, and no conflict of decisions is presented. While the case is similar in several respects to *Watkins* v. *United States,* pending on writ of certiorari, No. 261, this Term,[12] it is distinguishable from *Watkins* in the important respect, among others, that the trial court in the instant case, unlike the trial court in *Watkins,* did not exclude as inadmissible any proffered evidence allegedly bearing on the question of the presence *vel non* of a valid legislative purpose on the part of the committee in asking the questions which the accused was charged with having unlawfully refused to answer. See pp.

[12] See, also, *Flaxer* v. *United States,* pending on petition for a writ of certiorari, No. 462, this Term.

42–53 of the Brief for the United States in *Watkins*.

For the reasons given above, it is submitted that the petition for a writ of certiorari should be denied. However, the Court may wish to withhold action on the petition until the disposition of the *Watkins* case.

Respectfully submitted.

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No. 742. BARENBLATT *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari in this case is granted. The judgment of the Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded for consideration in light of *Watkins* v. *United States*, 354 U. S. 178. MR. JUSTICE BURTON took no part in the consideration or decision of this case. MR. JUSTICE CLARK dissents for the reasons stated in his dissenting opinion in *Watkins* v. *United States*, *supra*. *David Scribner* for petitioner. *Solicitor General Rankin*, *Assistant Attorney General Tompkins*, *Philip R. Monahan* and *Doris H. Spangenburg* for the United States. Reported below: 100 U. S. App. D. C. —, 240 F. 2d 875.